

In the Matter of:

USA v. Rafiekian et al.

March 15, 2019



Phone: 703-837-0076
Fax: 703-837-8118
Toll Free: 877-837-0077

1010 Cameron Street
Alexandria, VA 22310
transcript@casamo.com

1 UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF VIRGINIA
3 (Alexandria Division)

4 -----

5 UNITED STATES OF AMERICA,

6 Plaintiff,

7 v.

No. 1:18-CR-457 (AJT)

8 BIJAN RAFIEKIAN,

9 A/k/a "Bijan Kian,"

10 and

11 KAMIL EKIM ALPTEKIN,

12 Defendants.

13 -----

14 March 15, 2019

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16 The above-entitled matter came on to be
17 heard before the HONORABLE ANTHONY J. TRENGA, Judge
18 in and for the United States District Court for the
19 Eastern District of Virginia, located at 401
20 Courthouse Square, Alexandria, Virginia, commencing
21 at 9:35 a.m., before Rebecca Monroe, RPR, when were
22 present on behalf of the respective parties:

1 A P P E A R A N C E S

2

3 ON BEHALF OF THE PLAINTIFF:

4 JAMES PHILIP GILLIS, ESQUIRE

5 EVAN N. TURGEON, ESQUIRE

6 United States Attorney's Office

7 Eastern District of Virginia

8 2100 Jamieson Avenue

9 Alexandria, Virginia 22314

10 (703) 299-3700

11

12 ON BEHALF OF THE DEFENDANT BIJAN RAFIEKIAN:

13 MARK J. MACDOUGALL, ESQUIRE

14 STACEY H. MITCHELL

15 Akin, Gump, Strauss, Hauer & Feld, LLP

16 1333 New Hampshire Avenue, Northwest

17 Washington, D.C. 20036

18 (202) 887-4510

19

20

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2

3 ON BEHALF OF THE DEFENDANT BIJAN RAFIEKIAN:

4 ROBERT POWELL TROUT, ESQUIRE

5 Trout Cacharis & Solomon, PLLC

6 1627 Eye Street, Northwest

7 Suite 1130

8 Washington, D.C. 20006

9 (202) 464-3311

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1 P R O C E E D I N G S

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3 THE CLERK: Criminal Case Number
4 1:18-cr-457, United States versus Bijan Rafiekian
5 and Kamil Ekim Alptekin.

6 And, counsel, will you please note your
7 appearances for the record.

8 MR. GILLIS: Good morning, Your Honor. Jim
9 Gillis, attorney for the United States.

10 THE COURT: Good morning.

11 MR. GILLIS: Good morning.

12 MR. MACDOUGALL: Good morning, Mark
13 MacDougall, Stacey Mitchell, and Robert Trout for
14 defendant, Bijan Rafiekian. Good morning.

15 THE COURT: Welcome.

16 MS. MITCHELL: Good morning.

17 THE COURT: We're here on the defendant's
18 motion to compel records. I reviewed the briefing
19 on this. Was there further -- from counsel -- have
20 there been any further discussions from counsel
21 about this?

22 MR. GILLIS: Not since those filings, Your

1 Honor.

2 THE COURT: All right. Mr. MacDougall, who
3 is going to be --

4 MR. MACDOUGALL: I am, Your Honor. Yes.

5 THE COURT: Yes.

6 MR. MACDOUGALL: Your Honor, may it please
7 the Court. Mr. Rafiekian, through counsel, is here
8 today. I should note, by the way, we have a waiver
9 of appearance --

10 THE COURT: All right.

11 MR. MACDOUGALL: -- signed, so we can hand
12 that up.

13 THE COURT: All right. That's fine.

14 MR. MACDOUGALL: Mr. Rafiekian, through
15 counsel, is here moving to compel the Government to
16 produce Giglio material. This is an unusual motion
17 at this stage of a case.

18 THE COURT: I don't think there's any
19 dispute about their obligation to produce Giglio
20 information. I think the core of this is what role
21 defense counsel should be able to play in reviewing
22 those documents that may yield that kind of

1 information.

2 MR. MACDOUGALL: Well, Your Honor, in this
3 instance, there was a great deal of public
4 information pointing toward Giglio in the
5 Government's files. This is not an ordinary case by
6 any means.

7 THE COURT: Right.

8 MR. MACDOUGALL: The Office of Special
9 Counsel has disclosed that they have -- that they
10 interviewed Mr. Flynn, who is the key witness in
11 this case, 19 times. If you add to that the
12 interview that led to his prosecution, that's at
13 least 20, probably more than that.

14 Those -- those interviews point toward a
15 great deal of information being able to glean from
16 public records that also qualifies as Giglio
17 material, multiple lies to transition team members,
18 FBI agents, the vice president of the United States,
19 payments from Russian companies that were not
20 disclosed to the Defense Intelligence Agency. There
21 is a lot there, Your Honor.

22 And Mr. Flynn is not an ordinary witness.

1 He is the witness in this case. I don't think
2 anyone would argue that if Mr. Rafiekian's business
3 partner was someone other than Mr. Flynn, this case
4 would have been handled civilly or administratively.

5 I should note, Your Honor, that the Office
6 of Inspector General, the Justice Department, did a
7 study in 2016, it recorded that over the previous 50
8 years there were a total of seven FARA prosecutions,
9 one of which led to a trial conviction. And if you
10 look at most of those cases they were essentially
11 espionage cases --

12 THE COURT: Right.

13 MR. MACDOUGALL: -- where the Government
14 couldn't make it.

15 This is unusual in every sense and that's
16 the reason, Your Honor, that we're asking for
17 unusual relief at this stage.

18 THE COURT: Well, what is it specifically
19 that you're asking for? Because, again, I don't --
20 I don't hear the Government objecting to producing
21 the kinds of information that you're suggesting is
22 out there. What I understand about the objection is

1 that you think the redactions that they provided or
2 that the information they're holding somehow
3 shouldn't be withheld and that you should have the
4 opportunity to review the unredacted documents
5 yourself, which is unusual.

6 MR. MACDOUGALL: Well, Your Honor -- well,
7 it's unusual but certainly not unique. I mean, open
8 file discovery, even in this courthouse, is not
9 unprecedented.

10 THE COURT: Right.

11 MR. MACDOUGALL: The answer to that, Your
12 Honor, is the Government hasn't produced and is not
13 prepared to produce. There's two factors here. The
14 first is -- and Mr. Gillis attached to his pleading
15 his e-mail -- the Government is seeking to impose a
16 number of conditions that would essentially have
17 defense counsel waiving the rules of evidence --

18 THE COURT: Okay.

19 MR. MACDOUGALL: -- and agreeing e-mails
20 and text messages are businesses records, which of
21 course, they're not; agreeing to consult with the
22 Government before using 302 in cross-examination; we

1 can't agree to any of that, Your Honor --

2 THE COURT: No, I understand.

3 MR. MACDOUGALL: -- and I don't think any
4 competent defense lawyer would. So that's -- that's
5 that issue. The second --

6 THE COURT: I understand that. I
7 understand there's a dispute about what the scope of
8 Giglio is in this case, but as I understand it,
9 those conditions are not being imposed for the
10 production of Giglio information, but simply being
11 requested to -- in connection with what they view is
12 disclosures beyond their obligations.

13 MR. MACDOUGALL: Well, no, Your Honor, the
14 fact is that 302 and this is -- goes beyond 302.

15 THE COURT: Right.

16 MR. MACDOUGALL: The 302s that were made
17 available, there were five relating to Mr. Flynn,
18 there have to be at least 20. And the five that
19 related to Mr. Flynn have not -- in the material
20 that we've laid out -- and none of the -- the
21 factual information that we've laid out, it's
22 clearly out there.

1 And -- and, you know, the Government has
2 said, well, it's sensitive. Well, that's not
3 something we have to worry about. And the
4 Government -- the Government has contended that --
5 that they should wait until a short time before
6 trial and that's just not fair, Your Honor.

7 And the reason that we're here before the
8 Court is, you know, Mr. Rafiekian has and through
9 his counsel has a great deal of work to do to put
10 together a cross-examination of Michael Flynn that's
11 effective. This is not simply asking the witness if
12 he's got a conviction, was it for a false statement,
13 and sitting down.

14 There's a great deal there and in order for
15 us to be effective, Your Honor, we have to
16 understand what it is. That has not been produced,
17 I think the Government made clear in its pleadings
18 that it wasn't going to be produced until some
19 future development. We don't have much time. We
20 have 30 days until our pretrial motions are due.

21 We -- without going into too much strategic
22 information, we have two law firms that have

1 received subpoenas. I think those are going to have
2 to be litigated and those relate directly to what
3 we're trying to accomplish here in being effective
4 and being prepared. That's all we're asking for,
5 Your Honor, is to be allowed to do our job and to
6 have access to information that the Court has -- is
7 entitled to. There's no statute or rule that says
8 five days before trial --

9 THE COURT: Right.

10 MR. MACDOUGALL: -- you get Giglio
11 material.

12 It's a unique situation, Your Honor.
13 Mr. Rafiekian is a man who is, in my view, broken.
14 He's broken financially, pro bono counsel, he's, you
15 know, alienated from his life and his work. All he
16 has to help us give him a fair trial is the Court
17 and --

18 THE COURT: Well, specifically other
19 than -- other than ordering that the Giglio
20 information be produced expeditiously, what
21 specifically do you want the Court to consider
22 ordering?

1 MR. MACDOUGALL: I -- we ask the Court to
2 also consider ordering the Government to inquire of
3 other agencies and that would include the Office of
4 Special Counsel, that would include the Defense
5 Intelligence Agency, that would include the
6 Department of Defense for other Giglio material.

7 And there is specific reason for that.
8 This is not a fishing expedition. It's been widely
9 reported from the payments that Mr. Flynn received
10 while a retired general, that according to the
11 general counsel, the Defense Department violated the
12 emoluments clause of the Constitution and also
13 several rules to which he was subject.

14 So there's a record here, it's -- it's --
15 part of it has kind of worked its way in the public
16 domain. So we know it's out there and that's what
17 we're asking for.

18 THE COURT: All right.

19 MR. MACDOUGALL: Thank you, Your Honor.

20 THE COURT: Mr. Gillis.

21 MR. GILLIS: Thank you, Your Honor. It's
22 obvious that the Court did read our filing, despite

1 the rather tardy production of it, although it was
2 produced within our time --

3 THE COURT: Right.

4 MR. GILLIS: -- frame. I wish that we
5 would have been able to produce --

6 THE COURT: Well, I didn't want to put off
7 the hearing because it seemed the issue could be
8 addressed now soon -- that they deserved to be
9 addressed now, sooner rather than later.

10 MR. GILLIS: I couldn't -- I couldn't agree
11 more, Your Honor, depending on your point of view.
12 But the one thing -- first of all, I need to make a
13 couple of corrections to what my dear colleague has
14 said.

15 First of all, the documents are available
16 currently. All of the -- all of the 302s that could
17 arguably relate to this case are available to then
18 review upstairs in -- in our office. We made them
19 available earlier, not all of them, Your Honor, but
20 we've made them -- some of them available and we are
21 happy to make them -- the rest of them available,
22 but we've asked for some reasonable conditions that

1 are in the e-mails that are attached to our response
2 and we've made two subsequent requests.

3 We did have a phone call about their
4 objections to the conditions, I'm willing to be
5 corrected on this, but my recollection is in the
6 last phone call we had, Mr. Trout undertook to
7 respond to our conditions with what he thought were
8 the reasonable conditions that they could live with.
9 So we've been trying to negotiate this, but we
10 haven't heard yet from -- the ball is in their
11 court.

12 So we're not trying to hide the ball here
13 at all. And in addition to all of the General's
14 302s having to do specifically with this
15 investigation, we're also willing to produce
16 redacted portions of any 302 of the General's that
17 were collected or made in the course of the Special
18 Counsel's investigation that do relate specifically
19 to this case.

20 Your Honor, we do draw the line though at a
21 fishing expedition into everything else that the
22 Special Counsel might have been investigating. And,

1 of course, it is a sensitive investigation and also
2 there are pending investigations that concern or
3 concern the subjects that would be revealed by an
4 unfettered review of 19 302s.

5 By the way, my understanding is that 15 of
6 those -- 15 of those come from the Special Counsel's
7 Office. Four of them were produced in connection
8 with our investigation and those, as I said, are
9 available in their entirety without any redactions
10 if we can just have some simple reasonable
11 conditions from the defense on that.

12 So apart from the sensitivities, that's not
13 what we're basing our argument on, Your Honor.
14 Regardless of how sensitive the materials might be
15 if they contain Brady or Giglio, they will be
16 disclosed. You can take that to the bank, Your
17 Honor. We are never going to -- going to fail to --
18 to live by our sacred obligations under Giglio and
19 Brady because some information might be sensitive.
20 And as the Court knows, even if it's classified, we
21 deal with it.

22 THE COURT: Right. I understand all

1 counsel has -- has appearances now, so...

2 MR. GILLIS: That's true, Your Honor. And
3 so we would make available any information that
4 directly related to the case. To the extent that
5 there might be something on the fence that's
6 extraordinarily sensitive, we'll bring it to the
7 Court's attention as provided under SEPA.

8 So there will be no issue, Your Honor, in
9 this case about production of Brady or Giglio,
10 regardless of where it comes from, regardless how
11 sensitive it might be; we will deal with that. What
12 we're objecting to is just a frolic through
13 everything else that the Special Counsel's Office
14 produced in connection with entirely unrelated
15 matters.

16 THE COURT: What about requests of the
17 scope of inquiry that they requested with respect to
18 other agencies?

19 MR. GILLIS: Your Honor, as we do in every
20 single case where we have reason to believe that the
21 United States intelligence community or any other
22 part of the government may have relevant -- may have

1 Brady or Giglio information, we do a review of that.
2 We submit what's called a prudential search request
3 with a long list of the subjects that we want them
4 to produce documents for. They do a thorough search
5 for those documents, they make them available to us
6 typically in the hundreds, often in the thousands of
7 documents, and we review them one by one to ensure
8 that there is no Brady or Giglio among that, and we
9 have done that. And in some cases we brought those
10 already to the -- to the Court's attention.

11 We are continuing that review because we --
12 because of the volume but also because we learned of
13 some more recently, but we will continue that review
14 and we will make timely disclosure of that
15 information.

16 THE COURT: But I take it the -- the Brady
17 and Giglio -- in particular, the Giglio information
18 that you have, that you know needs to be disclosed,
19 has been made available only as you've indicated,
20 you've told them you have the 302s available, you
21 can come look at them under certain conditions; is
22 that accurate or not accurate?

1 MR. GILLIS: That's true, Your Honor. One
2 of the conditions, for example, being that -- that
3 we'd like, in exchange, some stipulations with
4 respect to routine matters that are routinely
5 accepted. These conditions are commonly asked for
6 and commonly agreed to by defense counsel in this
7 district including the Federal Public Defender's
8 Office and some of -- and many other attorneys that
9 are equally fine to these -- these attorneys'
10 excellent reputations.

11 And -- and you also make them available in
12 a way that they can take notes on them, they can
13 review them as often as they want, and those --
14 those binders we do keep because they concern
15 sensitive matters and we don't want them leaving our
16 office, and that's one of the conditions that
17 we've -- that we've asked for.

18 Now, those binders are -- are cordoned off
19 from anybody on the trial team. The only -- the
20 only time anybody in our office touches them is when
21 they make a request to come over and see them. We
22 set them up with a conference room and we'll let

1 them stay there for as long as they want. They've
2 done that for five days with the materials that
3 we've already produced and they can look at them
4 from now until the trial as far as we're concerned.

5 Moreover, Your Honor, we will produce that
6 entire binder of evidence regardless of whether they
7 pertain to the Government's witness, we will produce
8 that entire binder of 302s that relate to this
9 investigation and this prosecution. We'll make
10 those available for them to have at their table
11 during trial so that they can refer to them -- so
12 that they can refer to them there.

13 With respect to this -- with respect to
14 this request, Your Honor, we submit, as we did in
15 our papers, the Supreme Court forbids what they're
16 asking. And Richie makes clear that with respect to
17 the Giglio and Brady obligations that we have,
18 unless there's some reason for the Court to suspect
19 that there might not have been full disclosure, as
20 the Supreme Court said, the prosecutor's decision on
21 disclosure is final.

22 Now, in the Stevens case that they refer

1 to, there are extraordinary circumstances. There
2 they're certainly not president -- present here when
3 the Court might reasonably have found that that
4 condition had been triggered. But reliance on
5 Stevens is completely out of place here because
6 nothing like that has been present in this case.

7 With respect to the Supreme Court's
8 direction to the Court with respect to Giglio and
9 Brady information, all that they have cited in
10 response -- or actually they haven't responded to
11 ours, we didn't give them time to do so
12 unfortunately, but -- but all that they have cited
13 are malum cases that recite our obligations that we
14 have no -- so --

15 THE COURT: Right. I understand.

16 MR. GILLIS: You may have heard enough,
17 Your Honor.

18 THE COURT: No.

19 MR. GILLIS: So I just want to correct one
20 statement, which is that this is somehow -- that
21 this would not have been brought had General Flynn
22 not been a business partner of Mr. Rafiekian and

1 he -- Mr. MacDougall referred to the number of
2 prosecutions under the FARA statute. This is not
3 such a prosecution, Your Honor. This is a
4 prosecution for conspiracy to violate section 951
5 and that is an entirely different matter.

6 And, moreover, this case involves a
7 conspiracy to influence congressional and public
8 opinion for a specific goal of a foreign government
9 being undertaken at the direction and control of
10 high officials within the government of Turkey. So
11 this is not a case that would not have been brought.

12 Mr. Rafiekian need not have had any partner
13 and under these circumstances this case certainly
14 would have been brought. I just want to make --

15 THE COURT: All right.

16 MR. GILLIS: -- that perfectly clear. If
17 the Court has any questions, I'd be happy to address
18 them.

19 THE COURT: Mr. MacDougall.

20 MR. MACDOUGALL: Just a couple of things,
21 Your Honor. Thank you.

22 Your Honor, I need to correct a couple of

1 things my friend, Mr. Gillis, noted. The first is
2 the Government can't change the question. The
3 reference that the Court continues to hear is
4 "related to this case," Giglio material doesn't need
5 to be related to this case, a lie is a lie and a bad
6 act is a bad act.

7 With respect to sensitivity, Your Honor,
8 the Court is certainly available to enter a
9 comprehensive protective order, you know, among
10 Mr. Trout, Ms. Mitchell, and me, you probably have,
11 I hate to say, 100 years experience in criminal law.
12 You're not looking at Whitey Bulger here, you know,
13 we will obey a protective order as we always have.

14 THE COURT: Those all have been in place
15 yet?

16 MR. MACDOUGALL: Well, there are some, but
17 I think a more robust protective order would
18 certainly be fine.

19 THE COURT: Right.

20 MR. MACDOUGALL: We're not interested --

21 THE COURT: Right.

22 MR. MACDOUGALL: -- in doing anything other

1 than obeying that.

2 Mr. Gillis noted that there were continuing
3 investigations going on and that is just
4 inconsistent with what the Special Counsel said two
5 days ago in a status report in Mr. Flynn's case
6 which ended with, in the Government's view, as
7 cooperation, and otherwise complete and otherwise
8 was -- this case -- the full sentence was, However,
9 while the defendant remains in a position to
10 cooperate with law enforcement authorities and could
11 testify in an EDEA case, should it proceed to trial,
12 in the Government's view this cooperation is
13 otherwise complete.

14 So, you know, if there -- there's anything
15 to worry about with respect to ongoing
16 investigations, that seemed to put an end to it,
17 Your Honor. There is one -- one note in
18 Mr. Gillis -- the Government's briefing that I did
19 want to bring to the Court's attention. There's a
20 reference to the identity of a witness being
21 protected for the time being to prevent any
22 reprisals or tampering involving a witness. We

1 don't understand that, Your Honor, certainly, you
2 know, I don't think the Court has any concerns about
3 us or Mr. Rafiekian having to do with -- with --
4 with that.

5 With respect to -- the Court did mention
6 that counsel was clear and that's true. What hasn't
7 happened yet is the entry of a SEPA Section 3
8 order --

9 THE COURT: Right.

10 MR. MACDOUGALL: -- which the security
11 officer requires in order to read us in. So I
12 understood that was going to be submitted today if
13 it can be submitted to the court soon. That's not
14 our place to do, that's -- that's the Government's.

15 THE COURT: The Government's, right.

16 MR. MACDOUGALL: So, Your Honor, we've
17 spoken our piece.

18 THE COURT: Correct.

19 MR. MACDOUGALL: We would ask for the
20 Court's help here on behalf of Mr. Rafiekian. Thank
21 you.

22 THE COURT: Mr. Gillis, what is the status

1 of that Section 3 order?

2 MR. GILLIS: It should be -- Your Honor, it
3 will be filed by -- by Monday at the latest.

4 THE COURT: All right.

5 MR. GILLIS: May I have one --

6 THE COURT: Yes.

7 MR. GILLIS: -- last word, Your Honor.

8 First of all --

9 THE COURT: Let Mr. Trout -- let's hear
10 from Mr. Trout first and then we'll --

11 MR. GILLIS: Oh, I'm sorry, please.

12 MR. TROUT: Thank you, Your Honor. Robert
13 Trout. I just wanted to correct one thing, my
14 clearance is not complete. Mr. -- Mr. MacDougall is
15 cleared. Without taking anything away from the
16 confidence that Mr. Rafiekian has in Mr. MacDougall,
17 I have been representing him for a good long time
18 and I know that he would like for me to be --

19 THE COURT: I thought you had gotten your
20 clearance, but you haven't?

21 MR. TROUT: I just checked about a week ago
22 and was told that its in process. Also,

1 Ms. Mitchell, who is here and important to the
2 defense team, has also not been cleared.

3 THE COURT: All right.

4 MR. TROUT: Thank you, Your Honor.

5 MR. GILLIS: And to be clear, Your Honor,
6 Mr. Trout and Mr. MacDougall have both been cleared
7 before. I have no reason to doubt that Mr. Trout --

8 THE COURT: All right.

9 MR. GILLIS: -- will be -- will be cleared,
10 we have no control over that, but that process does
11 sometimes take time depending upon the last time
12 that there was a background investigation in place.

13 THE COURT: Well, let's -- from your
14 perspective, what's the -- what's the problem in
15 producing earlier rather than later the documents
16 that you intend to produce before the trial?

17 MR. GILLIS: None, Your Honor. We're --
18 we're prepared to produce all the documents that
19 we've -- we're not suggesting that five days before
20 trial is -- is what we're planning. As soon as we
21 become aware of Giglio information, we disclose it.
22 We're not --

1 THE COURT: Right.

2 MR. GILLIS: We're not -- we're not sitting
3 on it until five days before trial.

4 THE COURT: And your objection is to
5 providing actual copies as opposed to simply
6 providing access?

7 MR. GILLIS: Well, to be clear, with
8 respect to the -- and I don't think that they have
9 objected to this aspect of it. We, as a matter of
10 practice in this district, we -- it's not uniform, I
11 have to confess, but in a case like this we do not
12 want those 302s leaving the office, despite what
13 protective order might be in place. We just don't
14 do it.

15 First of all, they're not entitled to them
16 at all. We're going the extra mile by providing
17 them the actual 302s, even though the rules made
18 clear that they don't -- they're not entitled to
19 them. We're producing all the 302s regardless if
20 they're going to be witnesses or not.

21 The only limitation that we have made to --
22 with respect to 302s and portions of 302s that

1 concern matters that are completely, completely
2 unrelated to this, and so with the respect -- the
3 rest of it, we don't have any chuck with the
4 defendants about getting access to that. And, as I
5 said, we're prepared to provide them access right
6 away.

7 I do want to say that whatever the special
8 counsel's office may be doing, there are other
9 districts or at least one other district -- pardon
10 me, Your Honor. I should not -- Your Honor -- and I
11 withdraw any representation as to how many there
12 are.

13 THE COURT: All right.

14 MR. GILLIS: I will say at least there are
15 other investigations that do not -- that would be or
16 could be hampered by disclosure of unfettered access
17 to the information that we -- that we propose to
18 redact.

19 If -- I mean, if this were even Jencks, if
20 I may get into that argument, Your Honor. I
21 don't -- I don't want to tax the Court's patience.

22 THE COURT: No, that's fine.

1 MR. GILLIS: But even if this could be
2 considered Jencks material -- the 302s, which
3 they're not; under the law, they're clearly not,
4 under Fourth Circuit law, and based on the statutory
5 language itself they're clearly not statements of
6 any witness, including General Flynn.

7 So even if we had General Flynn's
8 statements, if you were going to consider the 302s
9 to be statements, the law requires that the Court
10 examine those parts in camera where we say that they
11 do not relate to the subject matter of his -- of his
12 testimony. That the Court would be required to
13 examine any portions of statements that the
14 Government presents to the Court ex parte. So they
15 would not still get access to them, even if they
16 could be considered Jencks.

17 In this Court in this district, the Court's
18 have routinely accepted the Government's
19 representation that we will produce all Giglio and
20 all Brady that we're aware of and we make a diligent
21 search and we're continuing to do so. We don't
22 expect to find much, if anything more, but our --

1 our trigger on that -- I have a hair -- personally,
2 I have a hair trigger for that, Your Honor, and I
3 don't know any good prosecutor that -- that doesn't.
4 So if I come across anything that is even arguably
5 remotely Giglio, it's going to get produced.

6 So it doesn't require -- so essentially
7 their motion is moot as to the district court in the
8 case that we cited found, and the Court should not
9 get into the mechanics of the discovery aspects
10 of --

11 THE COURT: Well, a big piece of this, as I
12 understand, is really a dispute over the conditions
13 that have been imposed to have access to what you're
14 offering.

15 MR. GILLIS: I don't know, Your Honor.
16 We're -- no. I -- I -- I don't believe that that's
17 the case. The conditions, as the Court can see,
18 are -- are fairly routine and reasonable. I can't
19 imagine any reason why they would object to
20 stipulating to the authenticity of bank records or
21 telephone toll records, records of that kind that I
22 don't know whether they think we're going to slip in

1 something or the bank thinks that --

2 THE COURT: Right.

3 MR. GILLIS: You know, those are routinely
4 agreed to.

5 THE COURT: Right.

6 MR. GILLIS: I don't know that the Court
7 wants to hear from half a dozen custodians of
8 records in order to establish them, but that is not
9 the hub of this motion. This motion doesn't even
10 really concern that. And to the extent that they
11 have objections to the conditions that we've asked
12 for, I've asked for their response and I'm still
13 waiting for it. So I don't -- I submit that the
14 Court should not get involved in that which we're
15 willing to try to work out.

16 So the conditions really aren't part of
17 this motion and I'm really not prepared to argue --

18 THE COURT: All right.

19 MR. GILLIS: -- that -- that part of it,
20 Your Honor.

21 THE COURT: All right. Mr. MacDougall, let
22 me hear from you. Because I understood what was a

1 big piece of this -- this problem here --

2 MR. MACDOUGALL: I'm sorry, Your Honor?

3 THE COURT: I understood the conditions
4 that they've asked -- that they've imposed is a big
5 piece of this problem.

6 MR. MACDOUGALL: Well, Your Honor, it is --
7 it is a -- it's big problem for us, as I mentioned
8 earlier.

9 THE COURT: Right.

10 MR. MACDOUGALL: I mean, some of the things
11 they're asking for are just malpractice from our
12 point of view, we can't agree to them. And we had
13 two lengthy conversations, Mr. Trout and I,
14 Ms. Mitchell was on one of them, on January 18th,
15 again on February 28th with Mr. Gillis about
16 resolution.

17 The issue here, Your Honor, is not what's
18 in the redacted book of 302s that --

19 THE COURT: Right.

20 MR. MACDOUGALL: -- that Mr. Gillis talked
21 about. And it's -- and it's not really in the
22 sacred duty he talks about. We have identified a

1 dozen situations that I'm sure were the subject of
2 inquiries by FBI agents, special counsel lawyers,
3 Department of Justice lawyers that are clearly
4 within the subject -- within the scope of the
5 Giglio. False statements, money from Russians,
6 violations of law; none of that is in the five
7 heavily redacted 302s we've gotten.

8 So even if we were to reach agreement with
9 the Government about the terms, which I'm not
10 optimistic we will, and if we were, what's being
11 offered is -- doesn't contain the Giglio that we
12 know is out there, not to mention the Giglio that
13 the media or others haven't identified yet. That's
14 the heart of our defense, Your Honor, and that's the
15 heart of our --

16 THE COURT: All right. Mr. Gillis, speak
17 to that specifically, that what you've produced
18 doesn't reflect what has been publicly reported,
19 arguably the Giglio. Have you looked into those --
20 those issues and --

21 MR. GILLIS: Of course, Your Honor.

22 THE COURT: -- inquiry into the FBI, the

1 other -- the other agencies that have been mentioned
2 for any -- any Giglio information that would pertain
3 to Mr. Flynn?

4 MR. GILLIS: Absolutely, Your Honor, we
5 have. And we have carefully reviewed all of the 15
6 302s that we obtained from the special counsel's
7 office. We have carefully reviewed all of the
8 documents that we've been able to get so far from
9 the USIC and from any other agency that might have
10 relevant information that we would need to examine.

11 What -- what the case law makes clear,
12 including the Supreme Court, is that our obligation
13 is to produce Giglio information. We're not obliged
14 to produce every single document in which it might
15 be contained.

16 So we have an obligation to produce Giglio,
17 if there's a single line in the 302 that suggests
18 that there is Giglio or Brady in there, we certainly
19 make that information available to the defense.
20 There is no argument there, Your Honor.

21 What we -- what we're objecting to is that
22 because there may be a single line in a single

1 20-page 302, we have to produce to them the entire
2 302.

3 The implicit part of their argument is that
4 we, as the Government, are either incompetent to
5 make that -- to recognize it or that we are
6 willfully unwilling to produce it, corruptly, in
7 other words, unwilling to produce it.

8 And that is an argument that would pertain
9 in any case, any time any defendant came into this
10 court they could say, look, there's, you know, this
11 is an important government witness, we need to see
12 every single 302, we -- we -- we need to review it
13 ourselves. And why stop there? It would only make
14 logical sense that you go from there right into the
15 entire Government's file in case there is some
16 possibility that we missed some bit of Giglio or
17 Brady.

18 THE COURT: Mr. MacDougall, let me ask you
19 this, have you itemized to -- for Mr. Gillis
20 specific areas that you've mentioned to the Court?

21 MR. MACDOUGALL: We -- well, we have to
22 some extent, Your Honor, but I'm certainly able to

1 do it now on the record.

2 THE COURT: All right. Well, no need to do
3 that, but -- all right. That's been -- that's been
4 done.

5 MR. MACDOUGALL: Well, we will certainly
6 send him a writing by the end of the day with all
7 that in. Thank you, Your Honor.

8 THE COURT: All right. All right.
9 Anything else on this?

10 MR. GILLIS: Not from us, Your Honor.

11 THE COURT: All right. The Court is having
12 difficulty understanding really the confluence of
13 the dispute. As I understand it, there are two
14 issues. There is no dispute as to the underlying --
15 Government's underlying obligations to produce
16 Giglio and I am concerned to the extent the
17 Government is conditioning that obligation on
18 other -- the agreement of the conditions; the Court
19 can address that.

20 But the other issue is that the Government
21 has not produced Giglio within areas that the
22 defense believes has been publicly reported as

1 containing Giglio information. What I'm going to do
2 is this, the Government obviously has an obligation
3 to produce Giglio information, they're reported to
4 do that as expeditiously as possible if they haven't
5 already done it.

6 I don't think you can qualify the
7 production of any information -- Giglio information
8 by requiring them to agree to any conditions as to
9 that. Can they be -- can be reasonable -- I'm sure
10 counsel will engage in reasonable agreements, but to
11 the extent that they can't agree on a condition, you
12 can't withhold information because they haven't
13 agreed to a specific condition.

14 MR. GILLIS: Of course --

15 THE COURT: To the -- to the extent that
16 you're producing information you believe is beyond
17 your Giglio obligation and are asking for conditions
18 with respect to that scope of production, then I
19 think you can engage in -- in discussions about what
20 conditions they can agree to; but if you can't agree
21 on those conditions, you still have the obligation
22 to produce the underlying Giglio information.

1 MR. GILLIS: Yeah, of course. I'm sorry, I
2 didn't mean to interrupt.

3 THE COURT: All right. Let me just
4 continue.

5 Also, I ask Mr. MacDougall to send to the
6 Government the specific listing of those areas in
7 which you think Giglio information exists, and in
8 which you've not received any Giglio information,
9 the Government can specifically respond that they've
10 discharged their obligation in that respect.

11 I understand from Mr. Gillis that he has
12 viewed his Giglio obligation of inquiry broadly and
13 that there is no need for the Court to -- to say
14 much more about that. I -- I'm fully confident that
15 he will discharge his obligation with that broad
16 scope.

17 MR. GILLIS: May I just say one word, Your
18 Honor?

19 THE COURT: Yes.

20 MR. GILLIS: To be clear, I have not and
21 would not ever condition our Giglio obligations upon
22 any stipulations.

1 THE COURT: Okay.

2 MR. GILLIS: And that has never been an
3 issue in this case.

4 THE COURT: All right.

5 MR. GILLIS: If there is Giglio, we have
6 and are prepared to disclose it. That is not the
7 condition we've asked for, it's simply a condition
8 for the wholesale, which we're offering --

9 THE COURT: Right.

10 MR. GILLIS: -- but the wholesale of review
11 of all of the witnesses' 302s, including those of
12 General Flynn, and so -- but to the extent there's
13 any Giglio involved in that, we have never
14 conditioned our obligation on that and I certainly
15 would never do so.

16 THE COURT: All right. Mr. MacDougall, I'm
17 not sure I've responded fully to the scope of your
18 motion, but if I haven't, tell me now.

19 MR. MACDOUGALL: Thank you, Your Honor.
20 It's -- it's -- I think the Court's order will be --
21 will be helpful. One request I'd like to make is
22 once we convey the list of matters we've identified

1 in the public domain, we'd like to include that in
2 the record of the case and file it with the court.

3 THE COURT: All right. That's fine.

4 MR. MACDOUGALL: Thank you, Your Honor.

5 THE COURT: All right. The Court will
6 issue an order on this.

7 MR. GILLIS: Thank you.

8 MR. MACDOUGALL: Thank you, Your Honor.

9 THE COURT: Counsel is excused.

10 (Whereupon, the proceedings at 10:11 a.m.
11 were concluded.)
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1 COMMONWEALTH OF VIRGINIA AT LARGE, to wit:

2 I, REBECCA MONROE, Court Reporter and
3 Notary Public in and for the Commonwealth of
4 Virginia at Large, and whose commission expires
5 August 31, 2021, do certify that the foregoing is a
6 true, correct, and full transcript of the
7 proceedings.

8 I further certify that I am neither related
9 to nor associated with any counsel or party to the
10 proceedings; nor otherwise interested in the event
11 thereof.

12 
13
14

15

16

Rebecca Monroe

17

Notary Public

18

Commonwealth of Virginia at Large

19

Notary No. 7243327

20

21

22

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